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No. 73-944

In the Supreme Court of the United States

OCTOBER TERM, 1973

PELZER REALTY COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The United States brought this action pursuant to the Fair Housing Act of 1968, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, alleging that petitioners were engaged in a pattern or practice of discrimination by (1) refusing to sell dwellings to black persons on account of race in violation of Section 3604(a), and (2) discriminating against black persons in the terms and conditions of the sale of dwellings in violation of Section 3604(b).

The district court found that the defendants had treated two black homeseekers differently from white customers, but concluded that the evidence was insufficient to establish a "pattern or practice" of discrimination within the meaning of 42 U.S.C. 3613 (Pet. App. A-12). The court of appeals reversed (Pet. App A-1 to A-16) in a

thorough opinion upon which we rely.[1] It held that the petitioners' conduct was "not an isolated or accidental departure from otherwise nondiscriminatory practices" (Pet. App. A-13), and remanded the case for the entry of a decree (Pet. App. A-16). A petition for rehearing *en banc* was subsequently denied (Pet. App. B-1).

Petitioners here challenge the court of appeals' interpretation of the "pattern or practice" requirement contained in Section 3613 of the Act.[2] That interpretation (Pet. App. A-13 to A-14) is correct and has consistently been utilized in other courts of appeals decisions. See, *e.g.*, *United States* v. *Hunter*, 459 F. 2d 205 (C.A. 4), certiorari denied, 409 U.S. 934 (housing discrimination); *United States* v. *West Peachtree Tenth Corp.*, 437 F. 2d 221 (C.A. 5) (housing discrimination); *United States*

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[1]Petitioners' contention that the charging of closing costs was not discriminatory is answered in the opinion below (Pet. App. A8-A9).

Petitioners' discussion of the letter to prospective clients asserts that the court below upheld the government's position (Pet. 16-18). In fact, the district court rejected that position (Pet. App. A-6), and the court of appeals found "no error in the district court's findings" in this area (Pet. App. A-11).

The court below correctly concluded that the suit was properly brought under 42 U.S.C. 3613 (Pet. App. A11-A13). That section does not require that conciliatory procedures be used before suit is instituted. Indeed, petitioners assert only that such procedures "should" be used, since they are "authorized" (Pet. 3, 19).

[2]Petitioners also contend that the case is now moot on the ground that one of them, Pelzer Realty Co., Inc., is no longer in business (Pet. 8-9). Although Mr. Thames, the other petitioner, states in his affidavit, submitted to the court of appeals after its decision in this case, that he has "ceased to sell any houses for others or for himself," he does not say he has permanently left the real estate busines (Pet. App. C-1). In these circumstances, the claim of mootness should be presented on remand in the district court, where the facts relating to it can be clarified.

v. *Iron Workers Local 86*, 443 F. 2d 544 (C.A. 9) (employment discrimination).

Citing a number of state court cases involving penal statutes, petitioners also contend that the Fair Housing Act of 1968 must be narrowly construed (Pet. 10-12), but this contention is inconsistent with the express purpose of the statute[3] and a recent decision of this Court. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 212.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

APRIL 1974.

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[3]"It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601.